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701768—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 161

CRAWFORD & DOHERTY FOUNDRY CO., A CORPORATION, PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The findings of fact and conclusions of law of that court appear at R. 19–26. The opinion of the circuit court of appeals (R. 302–314) is reported in 154 F. (2d) 431.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 16, 1946 (R. 314–315). The petition for a writ of certiorari was filed on June

10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

1. (a) Whether the circuit court of appeals erred in applying to the term "purchaser of the same class" as used in the General Maximum Price Regulation (*infra,* pp. 17–18) an allegedly different construction from that urged by the Price Administrator at the trial.

(b) Whether the construction of the above-mentioned term, "purchaser of the same class," urged by the Price Administrator in the trial court was materially different from that later advanced by him in the circuit court of appeals, and applied by the latter court.

2. Whether a manufacturer who sells his commodity above the maximum prices permitted by the applicable price regulation, may avoid the treble-damage provisions of Section 205 (e) of the Emergency Price Control Act (*infra,* pp. 14–16) by showing that he advised the purchaser, subsequent to the sale, to retain the excessive portion of the price pending a future allowance of higher prices by the Price Administrator.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the

applicable regulations, are set forth in the Appendix, *infra*, pp. 14–21.

STATEMENT

Petitioner, a corporation existing by virtue of the laws of the State of Oregon and having its principal office and place of business in the City of Portland, Oregon, is a manufacturer of iron castings (R. 20). During the period from May 11, 1942, until October 26, 1942, petitioner as such manufacturer was subject to the provisions of the General Maximum Price Regulation, *infra*, pp. 16–18 (R. 20, 304), and since the end of that period it has been the subject to the provisions of Maximum Price Regulation No. 244, *infra*, pp. 18–21 (R. 21).

The General Maximum Price Regulation froze the prices of thousands of commodities, including the iron castings involved here, at the highest price charged a "purchaser of the same class" for the same commodity during March, 1942. During the period between August 1, 1942, and October 26, 1942, petitioner sold iron castings to several purchasers and charged therefor prices higher than those which it had charged the same purchasers during the base period. However, the prices charged the several purchasers were no higher than those which it had charged during the base period to the Marine Electric Company, another and different purchaser.

Maximum Price Regulation No. 244, *infra*, pp. 18, 21, which became effective with respect to sales of iron castings made after October 26, 1942, established as the maximum prices for such commodities, the highest prices charged by the seller to the same purchaser during the period from August 1, 1941, to February 1, 1942, inclusive. On or about April 14, 1942, petitioner distributed to various purchasers new price lists for iron castings, asking prices higher than the prices which it had charged the same purchasers for the same commodity during the period from August 1, 1941, to February 1, 1942, inclusive; and subsequent to October 26, 1942, iron castings were sold by it at the higher prices (R. 118–119, 122–124, 126–127).

On July 31, 1943, the Price Administrator brought this suit against petitioner, seeking to recover treble damages on account of the sales made to the several purchasers (not including the Marine Electric Company), and seeking to have petitioner enjoined from selling or offering to sell iron castings at prices higher than those established by Maximum Price Regulation No. 244 (R. 2–8).

At the trial, the Price Administrator urged with respect to the sales made during the period when the General Maximum Price Regulation was applicable, that the several purchasers were not "purchasers of the same class" as Marine Electric. He based his argument principally on

the differences in the prices charged during the base period (R. 42), also calling attention to supporting factors, such as location of the purchasers (R. 42) and quantities ordered (R. 45).

The district court found, with respect to the sales of iron castings made during the period when the General Maximum Price Regulation was applicable, that the several purchasers alleged to have been charged excessive prices were purchasers of the same class as the Marine Electric Company, and that since the prices charged such purchasers were no higher than those charged Marine Electric, they did not exceed the prices charged to a "purchaser of the same class" (R. 20–21, 24–25). With respect to sales made subsequent to October 26, 1942, at prices allegedly in excess of those established by Maximum Price Regulation No. 244, the district court found that such prices did not exceed the authorized maximum prices, since the purchasers had been permitted by agreements with petitioner to retain in their possession, respectively, the amounts of the excess (R. 21–25). The district court thereupon dismissed the complaint.

The circuit court of appeals reversed the judgment of the district court, holding that the sales made during the period when the General Maximum Price Regulation was applicable, were not made to purchasers of the same class as Marine Electric, and that such prices were above the

ceiling. With respect to the sales made after Maximum Price Regulation No. 244 became effective, the circuit court of appeals held that the evidence did not show that the agreed prices were at the lawful maximum. It further held that the advice to retain the excessive amounts was a unilateral statement rather than an agreement; that it was not shown to have been given before delivery; and, in fact, that it was not even inferentially shown that the contract of sale had been modified (R. 309).

ARGUMENT

1. Petitioner contends that the court below erred in basing its decision with respect to the violations which occurred prior to October 26, 1942, on a construction of the term "purchaser of the same class", appearing in the General Maximum Price Regulation, which, it alleges, was different from the construction urged by the Price Administrator at the trial and applied by the trial court.

Assuming, without conceding, that the basis of the decision of the court below was a construction of the above-quoted provision of the regulation not urged by the Price Administrator at the trial, we submit that the action of the court below did not constitute reversible error. See *Hormel* v. *Helvering,* 312 U. S. 552, 557–558, wherein this Court upheld the action of the circuit court of appeals in basing its decision on the

applicability of a section of the statute there involved entirely different from the sections relied upon by the Commissioner of Internal Revenue and considered by the Board of Tax Appeals (now the Tax Court). In that case this Court pointed out that the rule which petitioner seeks to invoke here that an appellate court should pass by, without decision, questions not urged below, is not an inflexible practice, and that it should not be applied where to do so would work an injustice.[1] In fact, as pointed out in the *Hormel* decision, the proceedings in *United States* v. *Shelby Iron Co.*, 273 U. S. 571, 579, and *United States* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 423, were remanded by this Court because the lower courts had failed to give consideration to phases of the cases involving legal theories not presented. Plainly, then, the rule upon which petitioner relies is not so broad as to require an appellate court, where it is satisfied that a construction suggested and applied below is wrong, to perpetuate the injustice by shutting its eyes to the erroneous construction.

In the case at bar the prior administrative construction (R. 305), which was called to the attention of the appellate court, was in harmony with

[1] This Court has on appropriate occasions decided cases on grounds not urged or considered below. Cf. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Dobson* v. *Commissioner*, 320 U. S. 489.

the construction placed by the court below itself and other circuit courts of appeal on identical language appearing in another price regulation. *Bowles* v. *Wheeler,* 152 F. (2d) 34 (C. C. A. 9), certiorari denied December 10, 1945, No. 499, October Term, 1945; *Bowles* v. *Nu Way Laundry Co.,* 144 F. (2d) 741, 747 (C. C. A. 10), certiorari denied, 323 U. S. 791; *Rainbow Dyeing & Cleaning Co.* v. *Bowles,* 150 F. (2d) 273, 274 (App. D. C.). On the other hand, the construction suggested to the trial court was not in accord with the appellate decisions in those cases. In the circumstances, we submit that the court below was competent to adopt a construction of the regulation which it and other appellate courts had found to be proper in connection with identical language appearing in another maximum price regulation covering other commodities. Hence, it committed no error in adopting a construction of the regulation slightly different from that suggested in the trial court.

In any event, the construction applied to the regulation by the court below does not appear to be materially different in legal theory from that actually urged by the Price Administrator in the trial court. At the trial the Price Administrator indicated that factors such as quantities ordered and location of the purchaser might be relevant in determining whether a purchaser would fall into one class or another, but that the

"most important" consideration for determining whether two purchasers fall within the same or different classes is the price that was charged (R. 41–42). In the appellate court the Price Administrator called attention to the administrative construction of the regulation which made customary difference in price treatment the exclusive criterion for determining whether a purchaser falls within one class or another.[2] Thus, the only difference between the two constructions suggested by the Price Administrator is that in the one price treatment is the most important and guiding factor, and in the other price treatment is the exclusive factor to be considered.[3] We sub-

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[2] By inadvertence this construction had not been presented to the trial court. However, it might well have been judicially noticed by the appellate court. *Bowles* v. *United States*, 319 U. S. 33; *Jones* v. *United States*, 137 U. S. 202. Suggesting this construction to the appellate court could not therefore be regarded as the urging of a new theory. *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 488–489.

[3] Referring to these interpretations, the Circuit Court of Appeals stated (R. 305): "The interpretations establishing the administrative practice under the regulations are that each purchaser to whom an article is sold in March, the base month, constitutes a separate class and the purchases thereafter by such a person are not to be at a price higher than charged to him in March 1942." The court's meaning is illuminated by the interpretations themselves, which are in a footnote to the quoted sentence (R. 305). They clearly indicate that the test of a separate class is whether there was a *practice* of *customarily* charging a different price, rather than casual sales with no continuity of practice: "Frequently, of course, a seller may have had the *practice* of giving a customer special low prices * * *. Thus a seller may have *customarily* given one customer—who by all ob-

mit that the difference is not one of real substance.

2. With respect to the sales made after October 26, 1942, petitioner contends that its advice to its purchasers to retain the excessive portions of the sales prices operated to make the sales legal by depriving them of their character as overcharges. But it is clear that fully consummated overcharges had occurred prior to the time when the advice to retain the excessive amounts was given. Whether the price lists be regarded as continuing offers and the orders as acceptances, or whether the sales were completed when the purchasers confirmed their orders by telephone or direct contact (R. 133), in each case an "overcharge" occurred at the time the sale was made within the meaning of Section 205 (e) of the Act. "Sale" is defined in Section 302 (a) of the Act, *infra,* p. 16, as including "contracts and offers"

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jective tests was exactly like many other customers—a special low price * * *. * * * his class was established by the seller's *practice* of giving him a lower price * * *" (OPA Serv. 11:968–9). "Thus if a laundry *customarily* charged two customers different prices * * *" (OPA Serv. 11:969). [Italics supplied.] In the instant case, there was a continued *practice* of selling to each of the purchasers involved on the basis of different price lists; these lists remained in force for a long period of time and pursuant to them a succession of purchases was made (R. 115–117, 123, 127, 138, 140). Thus the court's reference to the principle that each purchaser cannot be charged more than he was charged in the base period is an accurate, though elliptical, reflection of the administrative interpretations as applied to the facts of this case.

to make sales, dispositions, etc.[4] Hence, the seller who is liable under Section 205 (e) "on account of the overcharge" includes one who has contracted to sell at a price higher than the legally authorized maximum, and accordingly the word "overcharge," as defined in Section 205 (e), "the amount by which the consideration exceeds the applicable maximum price," is broad enough to include the excess above the ceiling price in a contract to sell, notwithstanding that payment has not yet been made.[5]

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[4] In addition, the word "sale" itself is in the definition, which must mean that the ordinary meaning of "sale" is included—which would certainly cover the situation here of contractual agreement, invoicing, and delivery. Under Section 19, Rule 4 (1), of the Uniform Sales Act (enacted in Oregon, *Oregon Compiled Laws Ann.* (1940), § 71–119), title passes when the goods are appropriated to the contract with the express or implied assent of the parties; this probably took place as soon as these castings, made to specification, were manufactured, and occurred, at the latest, at the time of delivery.

[5] The definitions of "maximum price" in Sec. 302 (i) and of "price" in Sec. 302 (b) corroborate the above analysis and produce a complete consistency with the other definitions. Thus "maximum price" is defined as the "maximum lawful price," and "price" is defined as the "consideration *demanded* or received in connection with the sale of a commodity." [Italics supplied.] Hence "maximum price" means the maximum consideration which may lawfully be *demanded* or received in connection with a sale, transfer, etc., or contract of sale, transfer, etc.

Taking into account, then, all of the other definitions, the definition of "overcharge" is to be read as follows: The amount by which the *consideration* exceeds the maximum consideration which may lawfully be demanded or received

Petitioner's liability having become fixed at the times when the sales were made, no subsequent advice given by it to the purchasers to retain a portion of the agreed consideration could relieve petitioner of that liability. The decisions are unanimous that even a refund of a paid overcharge does not relieve the seller of liability growing out of the violation. *Gilbert* v. *Thierry,* 58 F. Supp. 235 (D. Mass.), affirmed, 147 F. (2d) 603 (C. C. A. 1); *Bowles* v. *Leventhal,* 61 F. Supp. 144 (S. D. N. Y.); *Trachtman* v. *Samit,* 62 F. Supp. 176 (E. D. Pa.); *Zwang* v. *A. & P. Stores,* 46 N. Y. S. (2d) 747. And this Court has held that even the subsequent revocation of the regulation does not disturb liability which has once become fixed. *United States* v. *Hark,* 320 U. S. 531.

Petitioner contends that its permission for the purchasers to retain the amounts of the overcharges was part of the original contract. However, as the court below observed (R. 308–309), the record is barren of any evidence to support the contention.[6] Moreover, even if petitioner's

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in connection with the sale, transfer, etc., or *contract* of sale, transfer, etc.

[6] Not only was there no showing that the advice to withhold the excessive portions of the price was given before the contracts of sale were made, but the only reasonable interpretation of the witness' statement that he divided the invoices as to those before October 26 and those after that date and advised the purchasers to retain the amount in question as to the latter (R. 219–220), was that he was referring to segregation of a number of invoices already in existence and that therefore the advice was given *after* delivery and invoicing.

contention were shown to be true, the agreements would still be violative. As stated by the court below, permission to enter into "adjustable pricing" agreements had to be obtained from the Administrator, and could be obtained only upon compliance with specific conditions which had not been met by petitioner (R. 312–313). And an overcharge conditional in form may be as inflationary as other overcharges since it puts pressure upon purchasers to safeguard themselves by seeking to increase prices to their own purchasers (cf. R. 116).

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and no question of public importance is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

DAVID LONDON,
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JULY 1946.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 632; 50 U. S. C. App. Supp. IV, 901 et seq.).

Section 205 (e):

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or re-

ceipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The amendment made by subsection (b),[1] insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall

[1] The reference is to Sec. 108 (b) of the Stabilization Extension Act of 1944 (58 Stat. 632).

be applicable only with respect to violations occurring after the date of enactment or this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

* * * * *

Section 302 (a):

The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

Section 302 (b):

The term "price" means the consideration demanded or received in connection with the sale of a commodity.

Section 302 (i):

The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations.

2. Pertinent provisions of the General Maximum Price Regulation, effective May 11, 1942 (7 F. R. 3153):

SECTION 1. *Prohibition against dealing in commodities or services above maximum prices.*—On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than

the maximum price permitted by this Regulation * * *.

SECTION 2. *Maximum prices for commodities and services—General provisions.*—Except as otherwise provided in this Regulation, the seller's maximum price for any commodity or service shall be:

(a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942:

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) (2) * * *

"Highest Price Charged During March 1942."

For the purpose of this Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942;

* * * * *

No seller shall change his customary allowances, discounts, or other price differentials unless such change results in a lower price. The "highest price charged" shall be a price charged during March 1942 to a purchaser of the same class.

SECTION 20 (k) "Purchaser of the same class" refers to the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, in-

dividual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.

3. Pertinent provisions of MPR No. 244, effective October 26, 1942 (7 F. R. 8558):

§ 1421.151 *Maximum prices for gray iron castings.*—(a) On and after October 26, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver gray iron castings, and no person shall buy or receive gray iron castings in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1421.166; and no person shall agree, offer, solicit or attempt to do any of the foregoing: *Provided,* That (1) if the purchaser shall receive from the seller a written affirmation that to the best of his knowledge, information and belief the price charged does not exceed the maximum price established by this Maximum Price Regulation No. 244 and that the seller has complied with all other provisions (including the filing requirements of § 1421.161) of this regulation, and if in such case the purchaser shall have no knowledge of the maximum price and no cause to doubt the accuracy of the affirmation, the purchaser shall have complied with this section; and (2) where the contract of sale has been entered into on or before October 25, 1942, the parties thereto may make and accept deliveries of the castings required or specified in such contract and the seller may render bills or invoices for such castings to the purchaser at the contract price, subject to adjustment of said price in accordance with

the maximum prices established by this Maximum Price Regulation No. 244 within a period not to exceed 30 days after the billing or invoicing.

* * * * *

§ 1421.152 *Applicability of General Maximum Price Regulation.*—The provisions of this Maximum Price Regulation No. 244 supresede the provisions of the General Maximum Price Regulation with respect to sales and deliveries for which maximum prices are established by this regulation.

§ 1421.156 *Adjustable pricing.* Any person may offer or agree to adjust or fix prices to or at prices not in excess of the maximum prices in effect at the time of delivery. Where a petition or application for amendment or for adjustment or for exception under § 1421.157 has been duly filed, a seller may make sales, deliveries or offers of sale at prices adjustable in accordance with the disposition of such petition or application and shall refund to the purchaser any moneys or other consideration paid which are in excess of the maximum price.

§ 1421.157 *Petitions and applications for amendment, adjustment or exception.* (a) Any person seeking relief from a maximum price or prices established under this Maximum Price Regulation No. 244 for a particular gray iron casting or particular group of gray iron castings, may present the special circumstances of his case in an application for an order of adjustment. Such an application shall be filed in accordance with Appendix B, incorporated herein as § 1421.167, and shall set forth the facts relating to the hardship to which such maximum price subjects the applicant.

(b) Any person seeking general relief from the maximum prices or from the formula or method of determining maximum prices established under this Maximum Price Regulation No. 244 may present the special circumstances of his case in a petition for an order of adjustment or exception. Such petition shall be filed with the Office of Price Administration, Washington, D. C., in accordance with Procedural Regulation No. 1, and shall set forth the facts relating to the hardship to such maximum prices or formula or method subjects the applicant together with a statement of the reasons why he believes that the granting of relief in his case and in all like cases will not defeat or impair the policy of the Emergency Price Control Act of 1942 as amended and of this Maximum Price Regulation No. 244 to eliminate the danger of inflation.

(c) Persons seeking any modification of this Maximum Price Regulation No. 244 or an adjustment or exception not provided for therein, may file petitions for amendment in accordance with the provisions of Procedural Regulation No. 1 issued by the Office of Price Administration.

(d) Supplementary Order No. 9 issued by the Office of Price Administration dealing with applications for adjustment of maximum prices of commodities sold pursuant to Government contracts or subcontracts shall not be applicable with respect to gray iron castings.

§ 1421.166 *Appendix* A: *Maximum prices for gray iron castings substantially the same as those which the seller sold or offered for sale at any time during the period from August 1, 1941 to February 1, 1942, inclusive.* The maximum price for each such

casting shall be the highest net price (after adjustment for all applicable customary charges, discounts, quantity differentials and other allowances in effect for the seller between August 1, 1941 and February 1, 1942, inclusive) at which the seller sold or offered for sale such casting to a purchaser of the same class during the period from August 1, 1941 to February 1, 1942, inclusive: *Provided,* That if the seller sold or offered for sale such casting during such period to a specified purchaser, he may not exceed the highest selling or offering price to such purchaser on sales or deliveries to such purchaser.

U. S. GOVERNMENT PRINTING OFFICE: 1946